



CCOF

Organic Certification Trade Association Education & Outreach Political Advocacy

May 12, 2006

Mark Bradley, Associate Deputy Administrator
USDA-AMS-TMP-NOP
Room 4008-South Building
1400 Independence Avenue, SW
Washington, DC 20250-0020

Comments on: Docket TM- 06-06-PR

Dear Mark,

We would like to thank the USDA for posting this proposed rule to address the court mandated regulatory changes of June 9, 2004 as well as those required due to Congressional change to the OFPA of Nov. 10. 2005. As you know, CCOF represents nearly 1,400 certified organic businesses as well as more than 300 supporting members comprised of business leaders, educators, and consumers working in and/or interested in organic products. As representatives of one of the oldest and largest USDA accredited certification agencies charged with verifying that the regulations are met, we agree with comments submitted by other certification agencies and believe that the regulations must be clear, consistent and the intent is well understood. However, we are concerned that the language as proposed is not clear and will cause inconsistent implementation of the USDA standard for organic production.

Revision Needed for §205.236

We support a uniform requirement for replacement dairy animals to be managed organically from last third of gestation. This is the current practice for certification by the large majority of agencies certifying organic dairy in the United States, including NOFA-NY, PCO, MOFGA, MOSA, Stellar, Oregon Tilth, VOF, and CCOF, who currently certify at least **906 dairy farms**, with approximately another **150 farms in transition**. Dairies represent CCOF's fastest-growing segment of organic producers, with new certification applications received weekly.

We offer the following suggested changes:

§ 205.236 Origin of livestock.

2) *Dairy animals - conversion of herds.* Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic, Except, That, crops and forage from land, included in the organic system plan of a dairy farm, that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products.

(3) *Dairy animals - replacement stock.* Once an operation has been certified for organic dairy production, all dairy animals, including all young stock whether subsequently born on or brought onto the operation, shall be under organic management from the last third of gestation.

Discussion

Transition Feed

We support the inclusion of the Congressional language regarding use of crops and forage under third year of organic management as feed for dairy animals converting to organic. We agree this will provide equity for dairy farmers who otherwise may be unfairly burdened with a four-year transition (due to three years need to convert crop and pastureland, plus a 12 month requirement for organic feed). However, we are concerned that the language as inserted may permit use of crops and forage produced during the first two years of transition, and suggest a punctuation change to indicate that crops and forage must come from land that is in the third year of transition. Other land that is not in third year transition state may also be included in the organic system plan, as well as stored crops and forage from previous harvests.

Origin of Livestock and Replacement Stock

We appreciate the retention of the clause now number 205.236(a)(2)(i) that requires organic management from last third of gestation. However, the explanation given in the Q and A states that the subparagraph applies to producers who convert “an entire distinct herd.” The Q and A implies that a producer that does not convert “an entire distinct herd” does not have to abide by this requirement.

It appears that the proposed regulation continues to present two ways (paths) that a dairy may follow to certify an animal or herd for the production of organic milk:

1. Organic management for one year, or
2. Via the exception, feed rations may include crops from land in the third year of transition.

Once the animal is converted through one of the two paths, it is not clear who is subject to the provision under (i):

1. All certified dairy producers?
2. Only those producers that transition via the exception?
3. Only those producers that transition an “entire distinct herd”?

The proposed retention of the term “entire distinct herd,” which is nowhere defined in the rule, causes problems. This phrase no longer appears in introductory paragraph of 205.236(a)(2), and so the basis for the restriction is unclear. The Congressional amendment did not use this term, and instead referred to “dairy farm” and “dairy animals.” The regulation elsewhere describes certification of “operations” not “herds” (205.100). Therefore, it is consistent with Congress, OFPA, the NOSB recommendation of May 2003, and the existing regulations to change “entire distinct herd” to “operation” to clarify that all operations must manage their young stock organically; no matter what path the operation chose to become certified.

Multiple Interpretations

We believe the proposed wording will create many difficulties for uniform interpretation by certifiers. It is critical that the regulation be clarified with regard to what a producer must do after transition in terms of raising or purchasing replacement animals. The proposed rule appears to permit the following scenarios, and raises some further questions:

- a. Farm A buys conventional animals as “an entire distinct herd” and converts them with one year of organic management. Must all subsequent animals born on the farm be organically managed? Can new non-organic replacement animals be purchased and converted individually after 12 months of organic management?

- b. Farm B establishes a split operation, in that calves born from certified animals are maintained on conventional feed and with conventional methods on the farm until 12 months of age. Can these animals then be transitioned to organic with one year of organic management prior to milking?
- c. Farm C sells all calves born from certified animals to a conventional calf raising business, and buys the animals back one year prior to producing organic milk (with the intent to convert the animals with one year organic management for organic milk production). If the animals are not “an entire distinct herd” is this permitted?
- d. Farm D has transitioned an “entire distinct herd.” Later, they buy individual animals from a “calf ranch” that buys conventional calves, raises them conventionally for 12 months, then converts them to organic after 12 months of organic management. Can these animals be purchased by Farmer D?
- e. Farm E buys a herd of already certified animals and starts an organic dairy operation. They claim that they are not bound by the last third requirement because they did not “convert” their herd to organic production—it already was converted. Can they subsequently buy conventional youngstock and transition them for a year as their replacement animals?
- f. Farm F, a long time conventional dairy farm, decides to transition half their herd to organic production and leave half under conventional production. Since they are not transitioning their entire herd, do they not have to follow the last third of gestation requirement?
- g. Farm G converts their entire, distinct herd to organic production. Is this the only scenario that entirely triggers the last third requirement?

As you can see, the potential exists for many interpretations of this language and continued perpetuation of a non-uniform standard for management of young animals. This will make enforcement of the regulation extremely difficult, and highlights the importance of a clear non-ambiguous regulation that can be uniformly applied by the certification agencies.

Other consequences

The lack of requirement for organic young stock will harm the market for organic heifers, and diminish demand for organic feed. It may allow young stock to be managed non-organically on a certified organic farm as part of a split operation. This will create continuing record keeping burdens and make verification of appropriate management extremely difficult. It will also decrease the supply of organic slaughter animals from dairy culls, and make tracking these animals more complex.

It is also potentially harmful to consumer demand since it allows for continuous importation of non-organic replacement animals, which may have been treated with antibiotics, hormones and non-organic feed. This is incorrectly represented in your preface to the proposed rule (FR 24823). Dairy farms do continually replace a certain percentage of their animals each year. Without a consistent requirement for animals managed organically since the last third of gestation, a substantial percentage of the animals producing milk on organic dairy farms could have been fed prohibited substances, including genetically engineered feeds, blood, animal fat and other slaughter by-products, and treated with prohibited medications for the first year of their lives. This is certainly contrary to consumer expectations as described in recent marketing studies presented at the recent USDA sponsored Organic Dairy Symposium.¹

¹ <http://www.ams.usda.gov/nop/PublicComments/DairyPastureSymposium/MaryEllenMolyneux.pdf>,
<http://www.ams.usda.gov/nop/PublicComments/DairyPastureSymposium/MargaretWittenbergPresentation>

Conclusion

A NOP regulation that continues to allow certain operations to treat young stock non-organically, while other operations (who have converted an “entire distinct herd”) must raise animals organically from last third of gestation, is inherently unfair, and conflicts with the stated purpose of OFPA, “to assure consumers that organically produced products meet a consistent standard” (7USC 6501(2)). The OFPA states that animals must be managed organically “not less than 12 months” prior to milk production, it also clearly states that “The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced” (7 USC 6509(d)(2)).

Revision Needed for §205.600(b)

The Court ordered in the Harvey ruling that regulations establishing criteria for review synthetic substances found at §205.600(b) were contrary to the plain language of the OFPA. (396 F.3d at 40). The NOP states that in November 2005 Congress amended the OFPA by “permitting the addition of synthetic substances appearing on the National List for use in products labeled “organic.” (71 Fed. Reg 24821). The USDA now states that this alters the need for the NOP to remove the regulations at §205.600(b). However, the current language inconsistently applies these criteria to synthetic “processing aids and adjuvants”, substances not specifically referenced in the Nov. 2005 OFPA amendment. It is extremely important to retain the stringent review criteria for use during the evaluation of any synthetic substance proposed for inclusion on the National List. Therefore, please make a technical correction in §205.600(b) to be consistent with the agency’s interpretation of the Congressional amendment. The regulation should be amended as follows:

§205.600 Evaluation criteria for allowed and prohibited substances, methods, and ingredients.

The following criteria will be utilized in the evaluation of substances or ingredients for the organic production and handling sections of the National List:

- a) * * *
- b) In addition to the criteria set forth in the Act, any synthetic substance used in handling ~~as a processing aid or adjuvant~~ will be evaluated against the following criteria:
 - 1) * * *

This correction will be consistent with the current NOP policy for materials review, which applies these criteria to all synthetic substances petitioned for handling, and are referenced in checklist evaluations used by NOSB for that purpose.²

Revision Needed for § 205.605, Synthetic substances

In order to be consistent with the USDA interpretation of the Congressional amendments, §205.605 should under go the following technical revision:

² EVALUATION CRITERIA FOR SUBSTANCES ADDED TO THE NATIONAL LIST,
<http://www.ams.usda.gov/nosb/meetingbooks/Oct2003/MaterialForms.pdf>

§205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s)).”

The following nonagricultural substances may be used as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s))” only in accordance with any restrictions specified in this section.

This change will clarify that all substances, which includes ingredients and the ingredients considered to be processing aids³, must appear on the National List in order to be used in foods labeled “organic” or “made with organic” ingredients.

Allowance of Other Synthetics

The NOP should also further clarify the status of synthetic substances in a consistent manner, by rescinding its “draft” policy allowing some synthetic substances, such as some indirect food additives and FDA identified “food contact substances”, to be used in products labeled “organic” or “made with organic” without review by the National Organic Standards Board.^{4 5} This confusing policy has not been uniformly applied, and is not well-understood certification agencies. The broad allowance of many synthetics that do remain in food under this FDA policy, is contrary to the court order and OFPA principle expressed that agricultural products labeled as organic shall “have been produced and handled without the use of synthetic chemicals, except as otherwise provide in this title.” (7USC 65104(1)) The “draft” policy would also allow things such as the synthetic juice preservative dimethyl dicarbonate to be used in organic products without NOSB review, and preservatives used in packaging in conflict with OFPA.⁶ As recently shown at the April 2006 NOSB meeting, consumer expectation is that organic products are not highly processed with chemicals, additives, or preservatives.⁷

Proposed Amendments to § 205.606

This section of the rule has been revised accurately to reflect the Court order that 205.606 be clarified to indicate that this is the complete list of non-organic agricultural substances allowed in organic products. However, another technical correction is required to remove existing language that states these restrictions are also applicable to those products labeled as “made with organic

³ See FDA regulations at 21 CFR Sec. 170.3 Definitions (e)(1) Food additives, 170.3 (g) substances, 170.3(m) food; 21 CFR Part 101--Food Labeling, Sec. 101.4 Food; designation of ingredients, also Sec. 101.100 Food; exemptions from labeling (a) (3) (ii) processing aids.

⁴ USDA/NOP, “Synthetic Substances Subject to Review and Recommendation by the National Organic Standards Board When Such Substances Are Used as Ingredients in Processed Food Products” available at <http://www.ams.usda.gov/nop/NOP/PolicyStatements/SyntheticSubstances.html>

⁵ The NOP has stated that the current Food Contact Substance policy is not final and “is part of an ongoing deliberation about how the Act and Rule operate.” Brief of Appellee at 23-24, n. 11, *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005) (No. 04-1379).

⁶ See detailed analysis of this policy presented to the NOSB by Organic Materials Review Institute in May 2003, available at <http://www.ams.usda.gov/nosb/PublicComments/NOPSynthSubstOMRI030703.pdf>, and <http://www.ams.usda.gov/nosb/PublicComments/AppendicesNOPSynthSubsOMRI030703.pdf>

⁷ see presentations of the Natural Marketing Institute available at <http://www.ams.usda.gov/nop/PublicComments/DairyPastureSymposium/MaryEllenMolyneux.pdf>, and Whole Foods Inc. at <http://www.ams.usda.gov/nop/PublicComments/DairyPastureSymposium/MargaretWittenbergPresentation>

(specified ingredients or food group(s)).” Products in the “made with organic” category may contain up to 30% by weight of any non-organic agricultural ingredients, not only those on the National List. (205.301(c)) This section of the rule is being clarified in response to the Court order to accurately reflect its application and scope, therefore the inaccurate references to the “made with organic” labeling category should be removed, as follows.

§ 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as organic ~~or made with organic ingredients~~.

Only the following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as “organic” ~~or “made with organic (specified ingredients or food group(s))”~~, only in accordance with any restrictions specified in this section, and only when the product is not commercially available in organic form.

Please take this opportunity to create fair and consistent regulations that “assure consumers that organically produced products meet a consistent standard.”

Thank you for your consideration and for your dedication and work on these issues.

Sincerely,



Peggy Miars
Executive Director
CCOF, Inc.